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No. 00-527

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WALKER COUNTY SCHOOL DISTRICT,

Petitioner,

v.

JENSINE BENNETT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Walker County School District seeks a Writ of Certiorari to review the Eleventh Circuit Court of Appeals' affirmation of the trial court judgment in favor of Respondents. That judgment was, in turn, an affirmation of the decision of the Administrative Law Judge [ALJ] in favor of the Respondents, who were the initial Grievants/ Petitioners in an administrative due process hearing held pursuant to 20 U.S.C. § 1415(b).[1] Respondents Jensine Bennett and her parents John and Denise Bennett are, respectively, a disabled child eligible for special education and related services and her parents residing within the jurisdiction of the Petitioner. The case concerns educational services provided to the disabled child in 1995.

Jensine has the condition of autism and other significant disabling impairments. In July 1996, Respondents, having removed Jensine from an inappropriate public school placement, requested a due process hearing under the Individuals with Disabilities Education Act, [IDEA] 20 U.S.C. §§ 1400 *et seq*. They contended that the 1995-1996 program offered by the Petitioner was not calculated to provide the child reasonable educational benefit and that it failed to provide her a free appropriate public education [FAPE] as required by IDEA. Respondents sought services in the only appropriate placement available, a school

1. The Individuals with Disabilities Act was amended in 1997 by Pub. L. 105-17, 111 Stat. 37 (1997). This provision is now 20 U.S.C. § 1415(f). The citations to IDEA in the administrative decision and some of the orders of the district court are to sections which have been recodified.

specializing in the treatment and education of autistic children. They also sought reimbursement for costs they expended on the placement as authorized by this Court in *Burlington Sch. Comm. v. Dept of Educ.*, 471 U.S. 359 (1985).

The Georgia Department of Education appointed an ALJ to hear the due process request who delayed the case at the request of the Petitioner to allow the School District's litigation expert access to Jensine's private school and the opportunity to conduct additional assessments and observations of the child. Thereafter, the ALJ conducted a full administrative trial and ruled that the educational program offered by the Petitioner did not provide the disabled child with FAPE. Accordingly, the ALJ ordered Petitioner to reimburse Respondent for Jensine's private day school for the 1995-1996 school year. In the administrative trial, hundreds of pages of school, psychological and medical records were exchanged and introduced by the parties. Petitioner tendered a pre-hearing witness list with dozens of witnesses. In total, twelve (12) lay and expert witnesses testified in the administrative trial. Petitioner preserved no objection as to the unavailability of any witness or the need to present additional evidence.

The Petitioner sued the Respondent seeking review of the administrative decision on March 12, 1997, and sought leave to submit unspecified additional evidence on July 7, 1997. On January 29, 1998, the district court acknowledged that certain evidence additional to the record of the administrative trial might be admissible, but found Petitioner's request inadequate as it failed to specify the particular evidence sought for admission. The court, at Petitioner's request, permitted full discovery but directed

Petitioner to file a motion after the completion of discovery requesting the admission of any specific additional evidence and stating the reasons supporting admission. The district court declined to reach the Family's motion for relief on *de novo* review at this time.

Following discovery, the Petitioner moved for consideration of specific additional evidence. On July 29, 1998, the district court considered each of the categories identified by Petitioner for admission and supplemented the record by admitting the deposition testimony of one (1) witness as additional evidence. The district court allowed the Petitioner to seek interlocutory review of this ruling and on November 30, 1998, the court of appeals denied the Petitioner's motion for permission to appeal.

On February 9, 1999, on further motion, the district court permitted Petitioner to introduce other documents as additional evidence. On February 25, 1999 the district court granted the Respondents' motion for final judgment and relief, affirming the decision of the ALJ after considering the additional evidence and making an independent review of the full record before it. The Petitioner appealed this judgment to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit affirmed the decisions of the trial judge and the findings of the ALJ. The petition for re-hearing *en banc* was denied by the circuit court on June 7, 2000.

B. Corrections to Petitioner's Statement of Facts

Given this Court's admonition that Respondents "have an obligation to the Court to point out in the brief in

opposition, and not later, any perceived misstatement in the petition," Sup. Ct. R. 15.2, Respondents show that the Petitioner misstated many of the events underlying the dispute. As an initial matter, Petitioner asserts that the individualized educational programs [IEPs] developed for Jensine prior to the 1995-1996 school year "were implemental without dispute." Petition at 4. To the contrary, the record before the ALJ and district court indicated that numerous expert evaluations, assessments and recommendations on the educational needs of the severely autistic Jensine were repeatedly ignored by the Petitioner. During Jensine's years in the Petitioner's school, Respondents urged and requested the type and duration of services recommended by experts in autism, including Petitioner's own experts, but these appropriate services were repeatedly omitted from Jensine's IEP. While the Respondent Family in an effort to work with the Petitioner did not file for due process during these years, Petitioner's assertion that they did not object to the failure in service is inaccurate.

Most glaring of the misstatements in the Petition is Petitioner's insistence that it was somehow denied crucial evidence at the administrative level. Despite the fact that neither Georgia's statutory scheme nor IDEA authorize discovery in due process hearings, Petitioner at the administrative level moved for and was permitted extraordinary pre-hearing discovery. The Petitioner made no contact with the Respondents from the IEP of August, 1995, until July 1996, when, after the Respondents sought due process, the Petitioner asked for the discovery opportunity to have its expert witness observe and evaluate Jensine. Respondents urged the ALJ that allowing such access by a witness hired for the sole purpose of defending the administrative claim was tantamount to discovery which is

neither contemplated in the IDEA administrative scheme nor allowed by Georgia state statute O.C.G.A. § 50-13-40(c) or regulations OSAH OFF. REG. § 616-1-2.38. The ALJ, nonetheless, ordered the observation/evaluation and Petitioner's expert witness went to the private placement to observe and evaluate Jensine and question the staff about her. This process delayed the hearing beyond the time for resolution permitted by state and federal law, over the Respondents' objections. Petitioner's argument that it was prohibited from conducting discovery at the administrative level and that it was unable to obtain records and testimony from the private placement prior to the hearing is not an accurate representation of the process utilized. Petition at 4-5. Furthermore, Petitioner's expert witness was tendered at the administrative hearing without objection by the Petitioner as to the adequacy of the material available to him.

Petitioner also asserts that Respondents' sole objections to the IEP developed for Jensine for the 1995-1996 school year centered on the lack of a summer program, the omission of occupational therapy services and lack of one-to-one services. Petition at 4. The evidence before the ALJ and the district court, however, indicated Respondents' objection was to the IEP in its entirety, including the lack of adequate goals concerning self-injurious behaviors, focus, communication and transition; the lack of IEP services designating expert training and consultation for school personnel; and the lack of a behavior management plan. Respondents also objected to the repeated lack of progress in Petitioner's program and to the Petitioner's tolerance for Jensine's serious self-injurious behaviors. The ALJ and district court found the IEP inadequate based on the lack of occupational therapy,

one-to-one services and inadequate summer services, not reaching Respondents' numerous other objections to the program.

Petitioner also misstates that it was unable to obtain Jensine's private school records prior to the hearing. Petition at 5. Respondents exchanged with Petitioner all records from the private school available to them five (5) days before the initiation of the hearing. The exchange was mandated by IDEA's hearing provisions as an alternative to traditional discovery and in the interest of disclosure.

Petitioner, likewise, asserts it was unable to obtain testimony of the private school employees or the in-state evaluator prior to the administrative hearing. *Id.* Petitioner's expert was provided unprecedented access to the private school employees pursuant to the pre-hearing order of the ALJ. Additionally, at the administrative hearing several witnesses from out-of-state attended cooperatively and voluntarily when requested to do so by the parties. The in-state evaluator was readily available to Petitioner, attending IEP meetings, and providing his written evaluation and opinions during the IEP process. Contrary to the implication in the Petition, the in-state evaluator testified and was cross-examined by Petitioner at the administrative hearing. In total, a dozen witnesses testified and hundreds of pages of exhibits and records were introduced into evidence. At no point in the process has Petitioner raised objections related to the unavailability of witnesses or documents.

The principal witness Petitioner sought to re-tender to the trial court was the same expert who had already testified in the administrative hearing. When asked the scope of such

testimony the Petitioner asserted that it would be similar to that in the administrative record. Petitioner emphasized it was contesting the credibility choices of the ALJ and believed that the trial court should re-hear this witness even though the transcript of the expert's testimony was already in evidence. Petitioner also sought the testimony from an additional, duplicate expert witness and defined the scope of such potential testimony as the same as the expert witness who previously testified. There also were witnesses the Petitioner sought to introduce who had previously testified or who were on listed on the Petitioner's initial witness list for the administrative hearing but did not to call. Several of these witnesses had been participants at IEP meetings, but multiple witnesses had previously testified about these meetings and the required minutes and records of the meetings were in evidence. In the trial court, the Petitioner never attempted to make a showing of unavailability of these witnesses during the administrative hearing and the facts only indicated that Petitioner made a strategic choice to save witnesses for the trial court. At no time was a report, deposition, or affidavit of any putative additional expert witness offered to the district court as a proffer or to comply with the rules of procedure. Nonetheless, the district court considered Petitioner's arguments and in the exercise of discretion admitted the deposition of one witness which was not cumulative. It also admitted supplemental records from the private school concerning Jensine and her program.

In affirming, the trial court made a specific finding on each aspect of the requested supplemental evidence. These findings of the administrative availability of the witnesses and the cumulative nature of the multiple expert witness testimony were not appealed as erroneous.

SUMMARY OF ARGUMENT

The decision of the court of appeals does not warrant review by this Court as there is no meaningful conflict among circuits. Instead, the circuits which have addressed the issue urged by Petitioner have agreed that as to additional evidence in IDEA cases, the trial court, pursuant to the Federal Rules of Evidence and tempered by the substantive statute, must make a discretionary determination of admissibility of evidence. The substantive statute at issue in the Petition is premised on "deference" by the district court to the administrative proceeding, at which parties have rights to a full evidentiary hearing, subpoenas, cross examination and confrontation of witnesses. 20 U.S.C. § 1415(h). *See Rowley v. Hendrick Hudson Sch. Dist.*, 458 U.S. 176, 205, 206 (1992). The Eleventh Circuit properly erected a standard appropriate to Georgia and consistent with the other circuits which takes into consideration multiple factors in the exercise of discretion. This is a standard which can be applied by all trial courts.

The court of appeals determination properly implements IDEA's duty to consider and, where appropriate, introduce additional evidence. The statutory use of the word "shall" does not mandate the unfettered admission of evidence as urged by Petitioner. Rather, the standard articulated by the Eleventh Circuit reaffirms a history of circuit case law which recognizes that the Federal Rules of Evidence also operate in any proceeding in a district court which has before it an IDEA administrative record. 20 U.S.C. § 1415(i)(2)(B). In any event, the rulings below limiting the introduction of evidence are independently sustainable under the Federal Rules of Evidence making this case inappropriate for consideration by this Court on a uniform standard. If one applies the *Bennett* rule, the Sixth Circuit rule or the First Circuit rule, the result would be identical.

REASONS FOR DENYING THE WRIT

I. THE CIRCUITS DO NOT CONFLICT ON THE DISTRICT COURTS' ROLE IN EXERCISING DISCRETION TO ALLOW OR TO STRIKE ADDITIONAL TESTIMONY

Petitioner argues that there is a sharp conflict between the First and Sixth Circuit's standards on the scope of evidence admissible in an IDEA case before the district court on *de novo* review. Petitioner 11-12. The argument ignores that the conflict, if any, is not over the discretionary duty of a trial court to rule on the admissibility of evidence, but a conflict on the semantics of the definition of "additional" evidence, i.e., as either "supplemental" to the administrative record, *Town of Burlington*, 736 F.2d 773, 790-791 (1st Cir. 1984), *aff'd*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985), or "extra," *Metro. Gov't of Nashville & Davidson County v. Cook*, 915 F.2d 232, 234 (6th Cir. 1991). This perceived difference in the definition of "additional," however, is neither functional nor outcome determinative, but as the appellate court below recognized, a matter of form over substance. Petitioner at 11a.

The Eleventh Circuit in the case below endorsed the First Circuit's multiple factors test on the admission of additional evidence set forth in *Town of Burlington v. Dept. of Edu.*, 736 F.2d 773 (1984), *aff'd on other grounds*, 471 U.S. 359 (1985). *Burlington*'s test for additional evidence considers the unavailability of witnesses, mechanical failures as to the transcript, the improper administrative exclusion of evidence and evidence of relevant subsequent events. The Eleventh Circuit cautioned that the factors of discretion are not an

exhaustive list, as other factors such as the availability or unavailability of discovery procedures in the administrative process must be considered. Petition at 9a-10a, and n.12. Other potential factors may be the failure of testimony, whether the parties were *pro se* or represented by counsel, whether the hearing was expedited, or, as in this case, delayed for months to allow the district to prepare its case, or any extraordinary reasons or events.

All the courts of appeal addressing the additional evidence standard under IDEA use reasoning similar to the Eleventh Circuit in adopting a series of considerations to frame the exercise of discretion allowing the trial court to act as it does in all cases, to manage the litigation and resolve evidentiary questions. In *Cook,* Petitioner's source of alleged circuit conflict, the Sixth Circuit found that a critical issue had not been addressed in the administrative proceeding, *i.e.*, the "least restrictive educational" environment appropriate to the student's needs. 915 F.2d at 235. To reach the previously unresolved issue, the district court allowed witnesses who had testified in the first administrative hearing to testify a second time on the area which had been unexplained in the administrative decision. *Id.* at 234. The Sixth Circuit was careful to explain that it was disagreeing with the position taken by the litigants before it said that *Burlington* supported "additional evidence only in limited circumstances" and declined to adopt that construction. *Id.* at 234. It then identified favorably that portion of *Burlington* also relied upon by the Eleventh Circuit. *Compare, Cook* at 234-235 with Petition at 9a. Finally, *Cook* endorsed a standard of judicial discretion in permitting the additional testimony. *Cook* at 235 ("[t]his portion of the opinion suggests that even the First Circuit would not have found fault with the consideration of the evidence of additional placements in the present case").

The Sixth Circuit's endorsement of the admission of such evidence is consistent with the First Circuit approach, and with that ultimately adopted by the Eleventh Circuit. The witnesses which were permitted did not present cumulative testimony, but testified as to a crucial substantive issue not dealt with by the ALJ. There was no retrying of issues for which the record was sufficient and no usurping of the administrative process and expertise. The Sixth Circuit further confirmed its consistent use of the *Burlington* standard in *Metro Bd. of Pub. Ed. v. Guest*, 193 F.3d 457 (1999) when it found error in the admission of additional evidence on issues not properly before the court. 193 F.2d at 463. Hence, the lone Circuit on which Petitioner relies presents, at best, an illusory conflict which upon closer examination does not represent a true disagreement.

Even utilizing the purported "restrictive" First Circuit's *Burlington* holding there is no real distinction between the circuits. *Burlington* reviews a district court order following a four-day trial which was supplemental to the administrative hearing. *Burlington*, 736 F.2d at 779. The district court evidentiary presentation occurred prior to this Court's holding in *Rowley v. Hendrick Hudson Sch. Dist.*, 458 U.S. 176, 206, that reviewing courts must give due weight to the administrative record and cautioning against substituting the reviewing court's judgement for the expertise of the administrative process. The First Circuit reviewed the district court's actions in light of the recent *Rowley* decision and found that the Act "does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony" as such would not be consistent with *Rowley*'s "due weight" requirement. *Id.* at 790. Acknowledging the court's inherent discretion in considering evidence, the First

Circuit rejected any rule that automatically prohibited testimony from all who actually or could have testified at the administrative hearing. It acknowledged that experts might testify to bring "this court up to date in the child's progress,"and that it would be "difficult to draw a sharp line" on evidentiary issues. Nonetheless, the First Circuit cautioned that the "determination of what is 'additional' evidence must be left to the discretion of the trial court." *Id.* at 791.[2]

Recognizing the overlap of *Cook* and *Burlington*, the Eleventh Circuit adopted the general language from *Town of Burlington* but reconciled the cases:

> The [Sixth Circuit] declined to approve the First Circuit's definition of "additional" to mean "supplemental" evidence; but the ultimate holding in *Cook* left the admission or exclusion of evidence in an IDEA proceeding to the sound discretion of the district court so that the difference between the First and Sixth Circuits on this point would seem to be more semantical that substantive.

Petitioner at 11a. The question to review is not the path a court takes to get to the standard, in this case the use of different dictionary definitions of "additional," but the rule of law actually established and available to the trial courts. The reality in the circuits is that there is a consistent and

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2. Under either *Burlington* or *Cook*, the court of appeals in the case *sub judice* would have been compelled to affirm the trial court's evidentiary findings. Using the *Cook* analysis, but applying the facts of *Burlington*, the Sixth Circuit would have reached the same evidentiary rulings permitted by the First Circuit in *Burlington*. Using the *Cook* facts, the *Burlington* court would have admitted the same additional evidence as the Sixth Circuit permitted.

sensible application of discretion utilized in IDEA cases on review which presents no conflict for this Court's consideration.

Other courts of appeals have addressed the IDEA additional evidence question in a consistent fashion. In *Independent Sch. Dist. No. 283 v. J.D.*, 88 F.3d 556, 560-61 (8th Cir. 1996), the Eight Circuit looked for "solid justification" to allow additional evidence. The additional evidence was denied, in part, on the basis of a 2000 page administrative hearing record and the requirement that the court must afford deference to the hearing officer's credibility choices in a fully litigated case. In *Monticello Sch. Dist. No. 25 v. George L. on behalf of Brock L.*, 102 F.3d 895 (7th Cir. 1996), the court of appeals affirmed the denial of additional evidence holding that the *Rowley* requirements of deference, due weight to the administrative decision makers and whether there was compliance with the Act's procedures limited the retrial in that case. *Id.*, at 901-02. The court noted that courts may exercise discretion to allow additional evidence "but we have certainly not mandated that a district court do so every time." *Id.* As the parents had not raised any claims that there were procedural errors by the administrative court, the extra evidence was not allowed.

In *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1993), the Ninth Circuit also adopted the *Burlington* language. *Id.* at 1473, *quoting Burlington*, 736 F.2d at 790-91. It used a multi-factored test in its exercise of discretion and allowed new evidence to bring the court up-to-date. *Id.* In *O'Tolle v. Olathe Dist. Sch. Unified Dist. No. 233*, 144 F.3d 692, 708-09 (10th Cir. 1998) the court of appeals noted its previous holdings that "the district court has discretion to determine if additional evidence is

necessary" and upheld the prohibition against additional evidence not timely tendered, utilizing *Rowley's* deference in its analysis. In *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998) the court of appeals also cited *Burlington* but noted that it did not want to transpose the administrative hearing into just a "dress rehearsal." *Id.*, at 667, *quoting Burlington*, 736 F.2d at 790-91 and *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 997 (1st Cir. 1990), *cert. denied*, 499 U.S. 912, 111 S. Ct. 1122, 113 L. Ed. 2d 230 (1991). The factor this court found dispositive was that there was no showing of unavailability of these witnesses and the information from these witnesses was earlier before the IEP committee. This court, like others, noted that allowing additional testimony after strategic decisions to withhold the testimony at the administrative hearing had been made would make the IDEA "process more time consuming, as parties scrambled to use the federal court proceeding to patch up holes in their administrative case." *Id.*, at 667. "Whether this lengthy process would serve students is doubtful at best." *Id.*

The standard utilized by the Eleventh Circuit also joins the First and Sixth Circuit's recognition that the district court process is a form of *de novo* review, not a *de novo* trial. As *Rowley* has instructed, the administrative hearing must be given deference. 458 U.S. at 205-06. When Petitioner urges *de novo* trial, it seeks to a review not contained in the Act or in the limitations of the "review" this Court has established. Petition at 15, n.4. An urging of such a broad review denigrates the importance of a prompt and full administrative hearing, encouraging litigants to withhold evidence for trial.

While presenting an illusory conflict among the circuits, Petitioner argues that review by the Supreme Court is

necessary as IDEA is a federal act, ultimately reviewed in federal court, thus presenting a need for a uniform explicit federal standard of review which allows federal consideration of the services provided and uniform federal review of the state administrative mechanism. Petition at 10, 16. Petitioner's argument for uniformity does not account for the duty of "due deference" to the state's administrative hearing decision, *Rowley,* 458 U.S. at 204-06, and also ignores the reality of the special education system. Petitioner is correct that some states have discovery in the administrative court and some do not. Some states have one-tier hearing processes, i.e., one administrative trial and then appeal to court, whereas other states have administrative trial, then administrative appeal, and then appeal to the courts for *de novo* review. These differences are part of the cooperative federalism of the Act arising from the Congressional intent to allow the states to manage and regulate much of the special education system. *Rowley*, 458 U.S. at 207-08. Some states have different delivery systems, some states include mental health agencies in the IEP processes, some states have different forms of regional schools, some states supplement the IDEA mandates with extensive state rules, but all allow issues arising from their system to be adjudicated in the administrative proceeding. IDEA allows these distinctions from state to state and these, in turn, require a flexible discretionary multi-factor test to guide a court's discretion. A singular standard urged by Petitioner would be antithetical to the design of IDEA.[3]

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3. A close legal analogy is that IDEA does not have a statute of limitations and, therefore, lower courts have followed this Court's guidance and borrowed the closest analogous statute from the forum state and tested that against whether or not it conflicts with the policies underlying the IDEA. This has led to the use of differing (Cont'd)

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER THERE MUST BE A UNIFORM STANDARD TO REGULATE THE ADMISSION OF ADDITIONAL EVIDENCE

Petitioner argues that this case should be reviewed to resolve the conflict it constructs between the First and Sixth Circuits on the meaning of additional evidence and the standard for its use under 20 U.S.C. § 1415(i)(2)(B)(ii). Petitioner's urging of unfettered admission of additional evidence reduces IDEA's evidence provisions as only limited by restrictions permitted under the Federal Rules of Evidence. Petition at 18. Even under this argument, however, review by this Court is not appropriate as the evidence sought for admission was inadmissable under the Federal Rules of Evidence. Petitioner's request for review does not seek review of the trial court's finding under the Federal Rules of Evidence. Moreover, any asserted conflict among the circuits dissipates when one reviews *Cook, Burlington and Bennett* within the context of the Federal Rules of Evidence. In the instant case, the trial judge exercised his discretion by declining to admit nineteen pieces of evidence relying on his interpretation of the "additional evidence" standard. Under the Federal Rules of Evidence, however, those same nineteen pieces of evidence are inadmissible for essentially the same reasons.

(Cont'd)
statutes depending on whether it is, by example, a substantive claim or an attorney fee claim. The borrowed statute of limitation also will differ from state to state. This lack of uniformity has never required uniform federal limitations periods and is a strength as the litigation of IDEA claims in federal and state courts conforms itself to that forum state's experience and softens the differences in the choice between forums.

A. Rule 403 and Cumulative Evidence

The district court excluded twelve pieces of "additional evidence" holding that the evidence was cumulative or repetitive. Petition at 90a-101a. In carefully analyzing each piece of evidence, the trial court noted that many of the proposed witnesses had either testified at the administrative hearing or would have offered testimony that was identical to testimony previously offered by other witnesses at the administrative hearing. *Id.* Under Rule 403, the trial court has the broad discretion to exclude relevant but cumulative evidence.[4] *Johnson v. C.F. Ashby, M.D.*, 808 F.2d 676, 678 (8th Cir. 1987); *United States v. Hooton*, 662 F.2d 628, 636 (9th Cir. 1981); *United States v. Mock*, 640 F.2d 629, 632 (5th Cir. Unit B 1981). Evidence that merely corroborates previously admitted evidence or repeats facts already in the record carries slight probative value thereby justifying exclusion of the evidence. *Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *Nat'l Post Office Mailhandlers, Watchmen, Messengers and Group Leaders Div. v. U.S. Postal Serv.*, 751 F.2d 834 (6th Cir. 1985). Such limitation on the admission of evidence takes into account that a case is not won solely by the party with the greater resources or the most witnesses.

Rule 403's limitations on cumulative evidence applies to Petitioner's proposed use of supplemental expert testimony. While cumulative expert evidence may be relevant

4. Federal Rule of Evidence 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence*." Fed. R. Evid. 403(emphasis supplied).

in limited instances, a court may still exercise its discretion to exclude such under Rule 403. *E.g.*, *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1309-10 (11th Cir. 1999). A trial court is not required to hear an expert witness testify twice, or to have three (3) experts testify on the same issues, all with similar credentials and perspectives, and all repetitive of each other. The district court was presented an expert who had testified extensively at the administrative hearing following an extraordinary pre-hearing evaluation of the child and the private facility. Not only did Petitioner seek the re-introduction of this testimony, it sought the admission of a nearly identical expert that Petitioner failed to use at the administrative hearing. Finding no adequate justification for the admission of this cumulative evidence, the trial court denied Petitioner's request. The trial courts' refusal to hear repetitive experts is a proper exercise of its discretion under the Federal Rules of Evidence regardless of the IDEA standard.

B. Rule 401 and Rule 402 of the Federal Rules of Evidence

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 of the Federal Rules of Evidence provides, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." As Petitioner concedes, courts reviewing administrative findings in an IDEA proceeding may look to these two basic rules of evidence to determine the proper scope of "additional evidence." Petition at 18.

Utilizing its traditional role of regulating the proceedings before it, the trial court deemed the proposed testimony of Dr. Lee Marcus and Dr. Ronald Wigley, and the deposition of Denise Bennett, and the testimony of Reba Smith, Debbie Sneed, and Kaye Cannon to be repetitive and cumulative. Petitioner at 90a-91a, 94a-95a, 87a-98a. The court properly noted that the evidence had either been introduced at the administrative hearing or would simply reiterate testimony given at the prior hearing. *Id.* This ruling is consistent with the district court's authority under Rules 402 and 403. Repetition of such evidence would carry no probative value as it does nothing more than restate what has already been asserted. Rule 402 permitted the trial court to exclude this evidence.

Petitioner failed before the district and appellate courts to address the inadmissibility of the proffered evidence under the Federal Rules of Evidence. Thus, without interpreting the "additional evidence" provision in the IDEA, the Federal Rules of Evidence operate to derive the same outcome. As compelling, the most recent cases in the courts of appeals applying the "additional evidence" standard would have also resulted in the same outcomes if the Federal Rules of Evidence were exclusively applied to determine admissibility. *Gill v. Columbia*, 217 F.3d 1027, 1037 (8th Cir. 2000) (court found no abuse of discretion in the trial court not allowing additional evidence when such evidence would merely be cumulative of a complete administrative record); *Patricia P. v. Board of Educ. of Oak Park*, 203 F.3d 462, 470 (7th Cir. 2000) (the court supported the district court's refusal to allow evidence not probative of the determinative issue in the case.); *Norton v. Orinda Union Sch. Dist.*, 29 IDELR 1068 (9th Cir. 1999) (court supported the trial court's exclusion of expert testimony that

was irrelevant to the eligibility issue in dispute.); *Springer v. Fairfax County School Board*, 134 F.3d 659, 667 (4th Cir. 1998) (court indicated that allowing "additional evidence" would be an "undue waste of time" that disserved the policies underlying the IDEA.); *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995) (the court noted the Rule 403 factors of relevance, waste of time, and presentation of cumulative evidence are to be considered by the district court when deciding whether to admit "additional evidence."); *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 155 (3d Cir. 1994) (court excluded "additional evidence" holding the proffered testimony to be repetitive, cumulative and irrelevant.); *Metro. Gov't of Nashville & Davidson County v. Cook*, 915 F.2d 232, 234 (6th Cir. 1999) (court held that non-cumulative and clearly relevant evidence was admissible to determine an previously unresolved issue.).

In summary, this case is fully resolved on alternative grounds under the Federal Rules of Evidence. Further review would only represent an advisory opinion and not alter the outcome of the case.

III. THE COURT OF APPEALS PROPERLY CONSTRUED IDEA

The court of appeals construction of IDEA as allowing full administrative adjudication of a child's needs and of requiring discretionary deference to the state tribunal determination is consistent with *Rowley* and the intent of Congress in passing IDEA. Petitioner's suggest that IDEA proceedings are aligned with Title VII of the 1964 Civil Rights' Act cases, 42 U.S.C. §§ 2000e *et seq.* Petition at 15. The most common path to court under Title VII is after an administrative grievance, which may involve an

investigation, but does not afford the full administrative hearing exhaustion as required by IDEA. Thus, the litigant clearly has a right to a trial *de novo*, as there is rarely a record available for review on the preponderance of the evidence standard. In most Title VII circumstances, there are no administrative proceedings below for which to offer deference.

Incredibly, the Petitioner argues that the court of appeal's approach will turn "IEPs into pitched battles . . . [as] then the parties will have to ferret out and incorporate into the administrative record all evidence supporting their arguments and countering those of their opponents." Petition at 16. As a consequence, Petitioner seeks a standard that denigrates the administrative process and allows a party to withhold arguments and evidence from the IEP and administrative decision-making. This would render IDEA's exhaustion requirement irrelevant and allows an undisciplined vehicle to circumvent due deference.

IDEA and its IEP, mediation and hearing processes are premised on the full and collective sharing of information concerning the student and the district's services. The Act guarantees the parent the right to informed consent, *i.e*, consent educated with a full airing of information and issues. 34 C.F.R. § 300.500(b)(1) ("consent means that — [t]he parent has been fully informed of all information relevant to the activity for which consent is sought"). Evaluation decisions are required to take place collectively with all arguments and counter-arguments presented. 20 U.S.C. § 1414(a)(1)(C). The key to the operation of the IEP team is that a district is obligated to give all the reasons and supportive data for the position it takes and all the reasons and supportive data for its rejection of the requests made by the parent. 34 C.F.R. § 300.503(b)(1)-(7). This frames the

issues in the hearing and the decision of the court of appeals supports directly the operation of this established process. Whether an IEP is a "pitched battle" depends on the relationship of the parties, not the standard of additional evidence in district court. A good faith IEP must rely on the disclosure of information. "We think the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content of the IEP". *Rowley*, 458 U.S. at 205-206. The attempt to reward one party for withholding evidence from the administrative hearing to use at trial will, in some cases, adversely impact educational decisions for disabled children and is a construction of this law that is unsupported.

The Petitioner eventually argues that the language of 20 U.S.C. § 1415(i)(2)(B)(ii) was intended to restrict the court's discretion to deny admission of evidence. Petition at 18. To support this they cite language from *Rowley*, 458 U.S. at 190 n.11, but this is part of this Court's response to the dissent in its review of the meaning of "appropriate" education, not a discussion of the scope of district court review. The better rule is that supplemental to the traditional rules of evidence is the substantive statute and a case-by-case review of the claims, evaluated by a multi-factor exercise of discretion. This gives meaning to the process, does not codify gamesmanship and balances the needs of school districts with the rights of the family and student. Petitioner's strained construction would undo twenty-two years of evolution of the special education practice, exulting form over substance and push case after case into the federal courts.

CONCLUSION

The court of appeals adopted a multi-factor consideration for a district court's discretion on the admission of additional evidence. This allows the court to manage the evidence, gives deference to the administrative decision, and allows appropriate additional evidence. There is no conflict among the circuits on the issue of additional evidence. Rather, all circuits utilize a multi-factor analysis balanced by the discretion of the court and the deference mandated by this Court in *Rowley*.

Respectfully submitted,

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November 6, 2000